United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1779

To be argued by
JOHN F. HAGGERTY

United States Court of Appeals
FOR THE SECOND CIRCUIT

MICHAEL T. ANDERSON,

Plaintiff-Appellee,

against

GREAT LAKES DREDGE & DOCK CO.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Preliminary Statement

On October 18, 1970, plaintiff was injured while employed as and working in the capacity of a deckhand aboard defendant's vessel, Dredge No. 50, at Pier 80, Hudson River. The questions of the defendant's negligence and the vessel's unseaworthiness were given to the jury by Judge Irving Ben Cooper, as was the issue of plaintiff's contributory negligence. The jury found the defendant negligent and the plaintiff 50% contributorily negligent and returned a verdict of $500,000 for the plaintiff which was accordingly reduced to $250,000 for plaintiff's con-

tributory negligence (A938-988).* The defendant's motions to set aside the jury's verdict were denied in a written opinion, found at page 995 of the Appendix.

The Facts

The day that the plaintiff's injury occurred was a Sunday and the crew of Dredge No. 50 was engaged in maintenance work, particularly the job of reversing a cable of the Dredge, end for end (A41, 68, 315, 317).

The cable that was being reversed was a heavy wire cable (1½ inch in diameter (A73)) one end of which is attached to a large drum located in the cab of the Dredge (A58). This cable extends from the drum in the cab up through the roof of the cab through a series of blocks on the boom of the Dredge down to and is connected to a so-called "clamshell bucket" (A58-60; Exhibit 2B), which is used to dredge the bottom of the river. The cables attached to the clamshell bucket both hold the bucket in place and control the opening and closing of the bottom of the bucket (A372-375) when it is being used in the process of clearing the bottom of the river.

The reversing process involves detaching the 1½ inch cable from the drum in the cab and allowing it to continue through the various blocks of the Dredge's boom down to the bucket which is either on deck or an adjoining scow (A70). The end that was formerly attached to the drum in the cab is then attached to the clamshell bucket and the end that was attached to the clamshell bucket is prepared to be brought up through the blocks on the boom to be connected to the drum in the cab (A68-72) to complete the reversing process, end for end.

The weight of this cable is so great that it cannot be allowed to be simply threaded through the blocks of the

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* Unless otherwise indicated all references are to the pages of the Appendix on Appeal.

boom without being connected to some device which is capable of pulling the reversed cable back up through the blocks of the boom and into the cab for re-connection to the drum (A68-72).

Thus, in the cab, and a few feet forward of the cable drum there is a "tugger winch" with a smaller drum and wire cable (½ inch diameter) (A63) which is used solely for the purpose of lowering the larger cable down through the blocks of the boom onto the deck and pulling it back up (A63; Exhibit 2C). This tugger winch wire is attached to the larger cable just when the end of the larger cable is removed from its drum and it is by means of this connection that the larger cable is properly lowered through the boom and down to the deck below (A71-72). It is then disconnected and the end of the larger cable which was formerly attached to the clamshell bucket is connected to the tugger winch wire for purposes of being pulled back through the blocks on the boom to the cab to be then disconnected from the tugger winch wire and re-attached to the large drum (A71-72), to complete the reversing process.

At the time the plaintiff was injured the heavy cable wire had been reversed on the bucket, connected by a "chinese finger" (A186) to the tugger winch wire and was being pulled back up into the cab to be secured to the drum (A71-72, 76). No part of the heavy cable wire had yet entered the cab, as at that time only about three turns of the tugger winch wire had been fed onto the tugger winch drum (A76).

The plaintiff had been assigned to the cab alone to operate the tugger winch in connection with the reversing procedure (A73). As he faced forward in the cab of the Dredge, the tugger winch was in front of him and the heavy cable wire drum was behind him from which the tugger winch wire was being led past him and onto the tugger winch drum (Exhibit 1; A76-80).

Plaintiff had his right hand on the lever of the tugger winch, which controlled the turning of the tugger winch

drum and at the same time he was trying to guide the tugger winch wire with his left hand so that it would wind evenly around the tugger winch drum and not overlap and damage the tugger winch wire (A76-82). It was also necessary for plaintiff to be prepared to receive signals from the other crew members on deck or the scow. Since the cab was enclosed and he could not see out on deck while operating the tugger winch, he had to be prepared to leave the winch and go over to the door on the left or port side of the cabin, as he faced forward, to receive these signals (A74-76). Thus plaintiff found it necessary, so that he would be nearer the open door at the left to listen for any signals shouted up to him, and to avoid having to jump over the tugger winch wire each time he had to run to the door, to stand to the left of the tugger winch wire which was spooling forward and past him onto the tugger winch drum to his right (A85-94; Exhibit 1).

Plaintiff found himself in the predicament of having to stand at the left end of the tugger winch to be closer to the door and having to extend his right hand over to the lever on the far right side of the winch while at the same time being required to guide the tugger winch wire onto the tugger winch drum by patting it with his left hand as it fed onto the drum between him and the lever. This necessarily placed him in the position of having to reach over the tugger winch wire with his right hand to regulate the control lever while guiding the tugger winch wire with his left hand (A94).

Suddenly, and without warning, plaintiff's left hand, on which he was wearing a glove, got caught on the tugger winch wire and he was pulled into and catapulted over the tugger winch drum (A80-81) as a result of which he received severe injuries.

The theory of plaintiff's claim against defendant and the basis upon which the case was presented to the jury (A880) was that the multi-faceted job that the plaintiff was

assigned to perform alone in the enclosed cab of the Dredge in connection with the process of reversing the heavy drum wire was a three man job and that the defendant was negligent in assigning an inadequate crew to this procedure (A85, 809, 804, 880). The Trial Judge set forth the plaintiff's theory clearly and succinctly (A880):

> "The only ground on which negligence and/or unseaworthiness is based is a lack of help and nothing else . . . A lack of help for that particular job. Accordingly, in determining whether the defendant is liable on the ground of negligence or unseaworthiness, you may consider only whether the plaintiff was injured because of the defendant's failure to provide enough men to handle the task that the plaintiff was performing."

The fact that the jury understood the plaintiff's claim of negligence based only on an inadequate crew is abundantly clear from their request for a rereading of the "questions and answers relating to the number of men usually engaged in the work that was being done at the time of Mr. Anderson's accident" (A943; Court's Exhibit No. 3).

There is no question but that there was a dispute between plaintiff and defendant relating to the number of men usually engaged in that type of work. This was the crux of the case and it was impliedly the primary fact question presented to the jury.

Plaintiff testified that there was normally three men assigned to this job (A85):

> "One man would run the tugger, the lever; one man would guide the wire on to the drum and one man would stand by the door to check the wire come up the boom and the wire running over the deck."

It was the plaintiff's contention that one man should have been delegated to handle the tugger winch controls

(the lever) while standing to the right of the tugger winch wire (instead of at the left where plaintiff was required to stand) which was being spooled onto the tugger winch drum (A83, 225-226). The second man should have been stationed to the left of the tugger wire to devote his attention solely to guiding the spooling of the wire onto the drum to prevent overlapping of the wire and to insure an even winding of it onto the drum (A86-87). A third man should have been stationed at the port door of the cabin which was about ten feet to the left of the tugger winch to check the wire on the deck or scow and the wire running up the boom of the Dredge and to be attentive for any signals from outside (A86-87).

Plaintiff claimed that being required to perform a three man job by himself, he could not devote proper attention, all at the same time, to the handling of the tugger winch lever control, the spooling of the wire onto the tugger winch drum, the checking of the wire on the deck or scow and listening for signals from outside the enclosed cab (A96; 225-226). He claimed that because there was no signal man he was required to stand to the left of the tugger wire and at the left end of the tugger winch drum, so that he would be nearer to the open door to hear, over the noise in the cab, any signals shouted up from the scow or deck (A94; 225-226). If he had stood at the right of the tugger wire, where the man controlling the tugger lever should ordinarliy stand, it would have required him to step over the spooling tugger wire to get to the door (A94; 225-226). It was plaintiff's claim that the defendant provided an inadequate crew, and that this played a role in causing his injury.

Plaintiff was supported in this claim by the operator of the Dredge and crane (A309), Edward Ducey, who was aboard the Dredge when the injury occurred (A308-362). He testified (A322):

> ". . . to my knowledge in my experience on these type of cranes the procedure that was followed there

was always at least two men in the crane, the body of the crane at the time that the wire was coming back through at least two.

. . .

"Well, one man would operate the tugger and the other man would hold the wire and feed it on the drum, on the tugger straight until you had a strain on the wire theoretically it would follow and he would stand in the door and watch the signals from the man that was watching the wire that you were receiving up through the boom.

. . .

"Any day but a Sunday I would have had three men, I would have had three men, I would have had my engineer up there. On a normal working day."

Ducey further testified that in fact on the day of the accident there could have been two men up in the cab to assist in the operation but that prior to beginning the operation the captain of the Dredge, DeGraff, came and ordered the other man to another job, "cleaning up on the port side of the dredge" (A316). On cross-examination he testified (A339-343) that he was going to send Mike and Bruce Anderson (plaintiff's brother) to tend to the tugger winch operation but (A343):

"He (Captain DeGraff) told me he was taking Brucie, that he wanted it cleaned up under the springline fairlead shiv to clean it up, and I said I need Brucie because we are going to start running the closing wire back to the drum.

"Q. . . . Now, you told Captain DeGraff, according to your testimony, that you needed Bruce Anderson?

"A. . . . Yes.

"Q. . . . And he took Bruce Anderson with him, you say?

"A. . . . Yes." (A344)

Captain William C. Ash, a master mariner with outstanding qualifications as a marine expert, testified in support of plaintiff's claim (A535-540). He stated that he had extensive experience with the type of tugger winch that was involved in this trial (A545). He was asked his opinion regarding the number of men needed to perform an operation of the type involved herein (A549) and testified (A549-550):

> "A. . . . My opinion is that in the operation of this tugger winch, as any winch, one man must be assigned to the controls, and the operation of the controls is his exclusive job, that he cannot do any other operation. Because if he has to leave it he has no alternative except to stop it, and walk away from it. But, as long as it has to be in operation, one man must stick with those controls in any type of a winch, particularly this tugger winch.
>
> Now, second point is if it needs manual assistance in receiving the wire on the drum evenly because there is no mechanical assistance, then another man has to do it. That the man who is operating the winch is serving two functions. He is first serving the function of operating the winch in a safe manner and, second of all, he is in a position to stop or reverse it instantly if something happens.
>
> The third situation is if a signalman is required for any reason, the operator can stop the winch while the man walked over to hear any signals, or determine whether anything was wrong, or whether the wire was running clear, but under no condition should a—less than one man be assigned to the exclusive operation of the winch. This is one exclusive operation.
>
> "Q. . . . Well now, Captain, assuming that on this occasion the tugger winch operator was unable to see out on deck to see what was going on, do you have

an opinion as to how many men should have been assigned to the job up in the cabin on that day with the Operation I described and asked you to assume?

"A. . . . Yes, I do.

"Q. . . . What is your opinion?

"A. . . . My opinion is that there should have been three men; one for the signalman, one for the manual veering of the wire on the drum, and one to operate that winch."

The necessity of three men for the tugger winch operation, or at least two, was disputed by the defendant through its employee Captain DeGraff (A620-633, 679-693) the skipper of Dredge No. 50 and Captain Wheeler (A634-678), an expert called on defendant's behalf, as were many subsidiary issues. These fact questions were given to the jury under proper instructions and the jury found that both the defendant's negligence in providing an inadequate crew and plaintiff's own contributory negligence caused the injuries.

Plaintiff's Injuries and Damages

a) ***Pain and Suffering and the Extensive Injuries.***

After the injury the plaintiff was taken to Polyclinic Hospital where he received emergency treatment (A99-100). He was transferred the same day to Doctors Hospital on Staten Island (A99-101). He testified that he was in great pain (A99-101). Examination of the plaintiff showed that as a result of the accident he had sustained a fracture of the midshaft of the left humerus (upper arm) with a left wrist drop due to radial nerve injury (A713, 714, 720). Also, there were multiple abrasions of the extremities (Exhibit 6). The wrist drop, as described by Dr Mauer, resulted in the plaintiff's left hand hanging down limp when his left arm was stretched out horizontally and with the plaintiff being unable to raise the hand to the hori-

zontal position (A714-719). Due to the multiple abrasions of the arm and severe swelling the doctors were unable to operate to reduce the fracture until November 9, 1970, three weeks after the accident. In the interim, the hospital record shows that the plaintiff complained continuously of pain (Exhibit 6, A100). Even after the operation the pain persisted and to such an extent, as noted in the hospital record three days later, that plaintiff was "crying" with pain and demerol was prescribed (Exhibit 6). The operation itself involved a reduction of the fracture and insertiton of a "vitallium plate and screw fixation and exploration of the radial nerve" by a neurosurgeon. It took three hours to perform (Exhibit 6).

Upon discharge from Doctors Hospital on November 18, 1970 the plaintiff continued under the care of the hospital doctors, but the wrist drop persisted and it was necessary for him to wear an extension splint to keep the wrist from dropping. When there was no recovery from the wrist drop by April, 1972 about one and one-half (1½) years after the accident, plaintiff entered New York University Medical Center for examination and treatment and after three days was discharged because, as was stated by the plaintiff in his deposition which was read before the jury by defendant's attorney, "the insurance people wouldn't let them" do anything for him (A423).

Finally, on May 22, 1974 he was admitted to the U.S.P.H.S. Hospital, Staten Island, New York for evaluation of the left wrist drop (Exhibit 8). On May 30, 1972 an operation was performed and it was found that the radial nerve was severed and only attached by fine strips of fibrous tissue (Exhibit 8). In order to correct the wrist drop a Jones Procedure involving the transfer of muscles in the left forearm was performed and the metal plate and screws were removed from the humerus (Exhibit 8). This operation took about three hours. On the second day after the operation the plaintiff developed dyspnea (difficult or

labored breathing) associated with minimal chest pain (Exhibit 8). He responded to "nasal oxygen" and was asymptomatic several hours thereafter (Exhibit 8).

The plaintiff was discharged, not fit for duty, on June 7, 1972 with instructions to return to the outpatient clinic thereafter (Exhibit 8). He was an outpatient at the clinic through January 30, 1974 when he was examined by Dr. Arthur A. Michele, an orthopedic consultant to the U.S.P.H.S. Hospital who found the plaintiff had a permanent partial disability of the left upper member (Exhibit 8). At the time of the examination by Dr. Michele the plaintiff complained of limited motion of the left arm, weakness and pain on pronation and supination and marked weakness and grasping and use of the left hand (Exhibit 8). The entries in the U.S.P.H.S. Hospital record continuously show that the plaintiff is fit only for light duty.

Dr. Irving Mauer testified on behalf of the plaintiff (A709-735). He had reviewed the medical record in the case and had conducted his own examination of the plaintiff on September 4, 1973 and had taken his own X-rays (A711, 719). He demonstrated to the jury, from X-rays taken at Doctors Hospital, the fracture of the left humerus which showed a separation of about ¾" between the fractured parts (A713, 721). He also described the Jones Procedure that had been performed at the U.S.P.H.S. Hospital and to put the results of the procedure into understanding terms, he used the example of an eight cylinder automobile with four cylinders on each side of the engine but with only four on one side functioning (A726). The Jones Procedure was like taking two of the functioning cylinders from the good side and transferring them to the side where no cylinders were working, which still left an improper functioning engine and in the case of the plaintiff an improper functioning arm (A726).

Dr. Mauer found from his examination in September, 1973 that resisted flexion of the plaintiff's left wrist was

extremely weak (A714-719). Abduction of the thumb was 50% of the normal and the left wrist extended only to about 60° as compared to the right wrist which extended to 90°. There was also a droop of the 4th and 5th fingers of the left hand (A712, 718). There was a restriction of about 75% of normal resisted pronation and supination and the plaintiff was unable to carry out any ulnar deviation of the left wrist as compared to 15°-20° on the right (A718, 719).

Dr. Mauer stated that the above findings were permanent and that plaintiff could not perform the duties of a *mate* or *operator* on a dredge with these permanent limitations and conditions (A727-728).

Dr. Mauer also described the permanent and disfiguring scarring on the plaintiff's left arm, which of course the jury observed itself when the plaintiff exhibited his bare arm in court (A714).

b) *Loss of Earnings*

The evidence showed that the plaintiff left high school in 1967 just before completing his second year and went to work as a "sand bagger" in connection with dredging work (A34, 35). He was about 17 years of age at the time. From 1967 until his accident on October 18, 1970, at which time he was 20 years old, he worked for a few companies but mostly with the defendant, Great Lakes Dredge & Dock Co. (A35-38). Because of his aptitude in the various skills expected of a dredgeman he quickly advanced to deckhand and then to relief mate in November, 1969, although on the day of his accident he was functioning as a deckhand (A39-40, 125).

The evidence indicated that except for the plaintiff's accident he would have become an "operator" on a dredge within the not too distant future (A128). An operator is one of the highest paying jobs on a dredge.

Ed Ducey, the operator of Dredge No. 50 on the day of the accident, testified how a dredgeman becomes an operator (A312-313). There is nothing unusual in progressing to such a position. All that is necessary is for a deckhand to show an interest in his work and ability to perform it (A313; A326-332). He would be observed by an operator and the Captain of the dredge and if his work record, aptitude and interest was good, he would be selected and given the opportunity to become an operator by on-the-job training (A312-313, 326). The person's age or length of service, was of no particular significance in promoting a man to operator (A326-332). Ducey testified that he had worked with the plaintiff over a period of time and had taken notice of his skills and interest in the work and considered him a competent and qualified dredgeman with a good chance of becoming an operator (A326-332). Captain DeGraff of Dredge No. 50 also testified that the plaintiff was "a good worker and competent" and had worked for him as a mate and performed his job competently (A480). Plaintiff himself testified that prior to the injury he "had been up in the cab" and was receiving the training to become an operator (A128).

Ducey testified that as an operator his daily rate of pay was about $69 (A325, 607). The testimony was that in dredging operations some jobs are scheduled at 6 days a week, others at 7 days a week. The jury, in figuring the income of an operator in the course of a year, under each schedule, could have arrived at a figure of approximately $21,500.00 (6 days) or $25,000.00 (7 days). The plaintiff earned $13,434.00 in 1973. Thus the jury could reasonably have inferred that the difference in the yearly earnings of a deckhand's pay and an operator's yearly earnings was about $10,000 (A325). It was stipulated that the plaintiff had a working expectancy of 42 years from his present age of 23 (A795, 852, 902). There was evidence by stipulation showing that there had been yearly increments in the rate of pay for the years 1971 to 1974 for dredgemen and such

increments could reasonably be expected in the future (A905). Thus, the jury had the basis for a finding of $400,000 or more for future lost earnings alone.

c) ***Cumulative Damages.***

In evaluating damages for the plaintiff's injuries, the two operations performed upon him, the extended hospitalization, the need to wear a brace for the wrist drop, the extreme pain he experienced, the fact that he had continuing pain up to the time of trial and will continue to have pain in the future, the permanent disability and restriction in the use of his left arm and hand, the permanent and disfiguring scarring on his left arm, and the loss of life's pleasures associated with the lack of full use of both arms and hands and the fact that all of the above permanencies will be with the plaintiff for his life expectancy of 47 years, and adding the consequences that these injuries have had upon the plaintiff's life and his ability to earn a living both at the time of trial and in the future, the jury returned a verdict of $500,000.00 for plaintiff.

POINT I

There was sufficient evidence to support the jury's finding that the negligence on the part of the vessel had played a role in causing plaintiff's injury.

There can be no question but that plaintiff working as a deckhand on a dredge in the Hudson River, was clearly a seaman under the terms of the *Jones Act*, 46 U.S.C. Secs. 688 and 713. (See, *Senko* v. *La Crosse Dredging Corporation*, 352 U.S. 370 (1957); *Norton* v. *Warner Co.*, 321 U.S. 565 (1944); *Lindgren* v. *United States*, 281 U.S. 38 (1930); *Ellis* v. *United States*, 206 U.S. 246 (1907); *Pariser* v. *City of New York*, 146 F. 2d 431 (2d Cir. 1945).) Thus, the standard or rule of law to be applied on a re-

view of this jury verdict as developed in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957) and again recently stated by this Court in *Mileski* v. *Long Island Railroad Company*, Docket No. 73-2751, decided 6/3/74 (2d Cir. 1974) at pages 3906-07 of slip opinion, is:

> "Construing the proof most favorably to the plaintiff, there was sufficient evidence to support a finding that negligence on the part of the Railroad had played a role in causing plaintiff's injury, which is the test. See *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Kuberski* v. *New York Central Railroad Co.*, 359 F. 2d 90, 93 (2d Cir. 1966), cert. denied, 386 U.S. 1036 (1967); *Easton* v. *Long Island Railroad Co.*, 398 F. 2d 738 (2d Cir. 1968)."

There was proof that although the tugger winch procedure called for a crew of at least two men, and even three men, plaintiff was assigned the task of performing this procedure alone, over the protestations of the operator Ducey to the vessel's Captain, that he needed the other deckhand for the tugger winch operation whom the Captain was taking away and assigning to a painting job.

The jury could reasonably have inferred that if a man had been assigned only to handle the control lever of the tugger winch, as the evidence indicated was proper practice, he could have stopped the winch immediately upon plaintiff's hand being caught and the injury would have been avoided.

Likewise, the jury could reasonably have inferred that if a signalman had been stationed at the doorway, as the evidence indicated was proper practice, the plaintiff could have stayed on the right side of the spooling tugger winch wire and thus not be required to lean over the spooling winch wire to maintain control of the lever and thereby avoid the accident altogether or at least be in position to stop the winch himself before being pulled onto or over it after his hand had been caught.

The jury could also have reasonably inferred that if there had been a signalman assigned to the door and another man assigned exclusively to the operation of the control lever, as the evidence indicated was proper practice, the plaintiff thus occupied solely with guiding the spooling of the wire onto the drum would have been able to guard against whatever it was that caught his gloved hand and pulled him into the winch.

Finally, the jury could reasonably have inferred that had there been a proper and adequate crew assigned to the tugger winch operation, plaintiff would not have been required to divide his attention to too many facets of this operation and thereby avoid his injury.

The rule of law that liability may be predicated upon inadequate or insufficient crew (*Waldron* v. *Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967); *American President Lines Ltd.* v. *Welch*, 377 F. 2d 501 (9th Cir. 1967); *American President Lines Ltd.* v. *Redfern*, 345 F. 2d 629 (9th Cir. 1965)) is not disputed by defendant (Appellant's brief p. 6-7). Indeed, defendant (*ibid.*, p. 7) vitrually concedes defendant's negligence in having an inadequate crew but argues that in the cases cited "the insufficiency of the crew resulted in the injured lifting or carrying more than one man should and sustaining injury by reason thereof" (*ibid.*, p. 6).

There appears to be no reasonable legal distinction upon which to predicate liability in the one instance and deny it in the other, between being required to "lift too much" and being required "to perform too many jobs" all at the same time. In both instances the inadequacy of the crew required the plaintiff to over-perform and as a result of this over-performance plaintiff was injured. Just as the Supreme Court noted in *Waldron* v. *Moore-McCormack Lines, Inc., supra,* that there is no justification for drawing a distinction between the ship's equipment, on the one hand, and its personnel, on the other, there is even less justifica-

tion for drawing the distinction offered by defendant in this case.

There is ample proof to sustain the jury's verdict on the question of liability even without taking into account the favored position of plaintiff's in this type of case. (*Gruenthal* v. *Long Island Railroad Company*, 388 F. 2d 480, 483 (2d Cir. 1968); *Basham* v. *Pennsylvania Railroad*, 372 U.S. 699 (1963); *Rogers* v. *Missouri Pacific Railroad, supra; McCann* v. *Smith*, 370 F. 2d 323 (2d Cir. 1966)).

POINT II

A detailed appraisal of the evidence bearing on damages clearly and reasonably supports the amount of the jury verdict.

The only basis upon which this Court may disturb the amount of the jury verdict upon appellate scrutiny is to reach a determination in applying the standard laid down in *Dagnello* v. *Long Island Railroad Co.*, 289 F. 2d 797 (2d Cir. 1961) and approved in *Gruenthal* v. *Long Island Railroad Co.*, 393 U.S. 156 (1968) that "the award was so grossly excessive or shocking to the conscience that it would be a denial of justice to permit it to stand." (*Mileski* v. *The Long Island Railroad Company, supra*). In *Mileski*, this Court nevertheless affirmed a jury verdict that "represents what appears to be an all-time monetary high for loss of an eye and is considerably in excess of other awards rendered during recent years for substantially the same injuries." (*Mileski* v. *The Long Island Railroad Company, supra*, slip opinion p. 3911). This Court did so because there was a reasonable basis in the record to support the trial court's determination and under the circumstances the Court will not disturb that judgment.

The Supreme Court of the United States in *Gruenthal, supra*, stated (393 U.S. at 159) that that Court read *Dagnello* "as requiring the Court of Appeals in applying the

above-stated standard to make a detailed appraisal of the evidence bearing on damages" and thereupon to decide not "whether we would have set aside the verdict if presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand." The Supreme Court approved *Dagnello's* standard of giving the benefit of every doubt to the judgment of the trial court, with the determination of whether an upper limit has been surpassed to be decided not as a question of fact as to which reasonable men may differ but as a question of law.

Applying this standard to a detailed appraisal of the evidence on damages in the instant case demonstrates sufficient basis in the record to justify the jury's verdict of $500,000.

Plaintiff was 20 years of age at the time of his injury. The injuries involved great pain, extended hospitalization and two serious operations all extending over a long period even up to and including trial. The record establishes that plaintiff suffered pain even at the time of trial and the jury could reasonably conclude that he would continue to suffer pain for the rest of his life. His arm was mangled and deformed and he was not able to enjoy the everyday pleasures of life such as being unable to hold his baby in his arms for any period of time because of the pain he would receive. The hospital record is replete with the details of his injuries and suffering and they have been outlined in this brief (pages 9 thru 12) and do not need repeating here, except to point out that there was sufficient basis for the jury to have made a substantial award for personal injury and pain and suffering.

There is evidence showing that as a result of his injuries plaintiff sustained a permanent disability to his left arm which would prevent him from being able to perform the duties of either mate or operator. The jury in determining plaintiff's future loss of income could reasonably have

concluded (see page , *supra*) that his annual loss of earnings for 43 years could be over $10,000 per year, taking into consideration reasonably anticipated promotions and reasonably anticipated salary increments.

Suffice it to say that although no mathematical formula can be applied to precisely determine how the jury reached its verdict, the method authorized involves a totalling of individual awards for each of the following: 1) wages lost before trial, 2) compensation for loss of future earnings, 3) past and continuing pain and suffering, 4) permanency of injury and 5) loss of enjoyment of life. There is a basis in the record for the jury in totalling any of the many combinations of awards they could have assigned for each of these areas of recovery to easily reach an aggregate in an amount even in excess of $500,000. And the jury did have the latitude with appropriate instructions to make an award for plaintiff on each of these items of damages.

It is significant that the trial judge who had an opportunity to observe the plaintiff and heard the many days of testimony concerning his injuries, the pain and suffering incident to the injury and the effect of the defendant's negligence on his future life and earning capacity refused to set aside the verdict for excessiveness (*Modave* v. *Long Island Jewish Medical Center, et ano.*, No. 906, September Term, 1973, decided 6/27/74 (2d Cir. 1974) slip opinion 4477-4504). In *Modave, supra,* this Court refused to consider a question of excessiveness raised on appeal since the trial judge had not had the opportunity to review the question and this Court returned the matter to the trial judge to hear and pass upon the motion to set aside a $650,000 verdict as excessive. In so doing this Court recognized the unique special ability the trial court possesses, having heard all the testimony and observed the witnesses, to pass upon the adequacy of the damages.

Applying the standards of *Dagnello,* with the detailed appraisal of the evidence bearing on damages as required by

Gruenthal, together with the trial judge's refusal to set aside the jury verdict below, it becomes abundantly clear that this Court would exceed its authority to now disturb that jury verdict. For where there are alternative reasonable and proper explanations as to how the jury reached the amount of the verdict, all found in the record, that verdict cannot, as a matter of law, be denial of justice, when this Court must give the benefit of every doubt to the trial court (*Gruenthal* v. *Long Island Railroad Co., supra*).

POINT III

Defendant suffered no disadvantage at trial. The assertions of partiality and prejudice stem from defense counsel's miscalculation of the jury.

a) The alleged prejudice of the Trial Judge

It is fundamental that the trial judge is not a spectator at trial; nor does he serve simply in the capacity of a moderator. His role is that of an active participant setting the tone of the proceedings and exercising sufficient control to insure that the jury is presented with the full testimony of the witnesses (*Quercia* v. *U.S.*, 289 U.S. 466 (1933)), and not the assertions of trial counsel. This is the role that the trial judge played in this case. In *Di Bello* v. *Rederi A/B Svenska Lloyd,* 371 F. 2d 559 (2d Cir. 1967), a similar claim of prejudice was raised on appeal in a Jones Act case in which the trial judge was accused of exhibiting partiality because of his interruptions of appellant's witnesses at trial. This Court approved the trial judge's actions stating that he could not be a mere spectator but must exert some degree of control over the proceedings.

In appellant's brief there are recited some 43 incidents of alleged bias or prejudice in the trial court below. It would serve little purpose to attempt to refute each of these charges. In the main they are baseless and/or contrived, in

that they are taken out of context. Some examples will suffice.

Thus, it is charged (Appellant's brief page 23) that the defense counsel was disadvantaged because "the Court limited counsel to 45 minutes apiece for summation (A 731). But the Court took approximately 2½ hours to charge the jury." What this assertion does not disclose is that in the midst of the 2½ hours of charge there was a recess (A 893). A more accurate barometer of equality between the summations and the charge of the Court, if, indeed, such a contrast can be grounds for prejudice, is the number of pages of the record that each covers. In this case, the Court's charge covers 70 pages (A 854-923) and the summations 54 pages; the Defense counsel's summation 30 pages (A 799-828) and puaintiff's counsel's summation 24 pages (A 289-853), a not too inordinate contrast.

Likewise complaint is made (Appellant's brief page 23) that the defendant was prejudiced because "at the very outset the jury was charged that 'every case is a big case'—(A 857)", with the intimation being that the trial judge was encouraging the jury to return a large verdict. This claim of prejudice is just not fair, for it takes the judge's instructions out of context. What the judge was saying to the jury is that every case is important to the litigants. His words disclose this (A 857):

> "This case has not taken very long to try. But, as I told you when you were being selected, every case on trial, whether it takes five days, five weeks or five months, and regardless of who is involved, is equally important under the law.
>
> • • •
>
> "In our system of judicial evaluation and disposition, every case is a big case."

To take this perfectly proper instruction to the jury outlining how important to the individuals involved, both

plaintiffs and defendants, each case is and thus the importance of the jury in their role as triers of the facts and attempt to turn it around, and quote just 6 words out of context violates all standards of fairness. But this is indicative of the scattergun approach indulged in by appellant grasping at any and all tenuous charges.

Thus, appellant complains (Appellant's brief page 24) that the trial judge's inquiry of whether or not the jury understood his instruction, "Do you catch my meaning?" was a subtle way of telling the jury that the Court had determined the negligence issue against the defendant. Preposterous! What appellant's brief does not disclose is that the trial judge had a habit throughout the trial of inquiring of the jury whether they understood what he was saying to them. When he was describing to the jury the fact that they could see exhibits received in evidence but not those only marked for identification the trial judge inquired of the jury "Is that clear?" (A45a). Again the trial judge when instructing the jury on the stipulation of counsel as to lost wages and the restrictions he was placing on them not to speculate what this stipulation might produce in the future, he again pointedly inquired of them (A607) "Do you understand that?" The trial judge stated for the record (A266) why he continuously sought to insure that the jury understood his instructions. He advised the jury (A266):

> "The jury doesn't sit there and suddenly put its hand up and say, Judge, I don't get that. You can't tell whether the jury is, to use the vernacular, *getting it.*"

So the trial judge regularly asked the jury whether it understood him and whether it got his point. The appellant takes one such inquiry totally out of context and says the trial judge was being prejudicial. That claim is utterly baseless and runs counter to the regularity with which those inquiries were made.

The appellant complains (Appellant's brief pages 30-31) because the trial judge commented on the credibility of defense witnesses although he has a perfect right to so comment in his charge (*Davis* v. *Central Vermont Railway, Inc.*, 227 F. 2d 948 (2d Cir. 1955)). So too, appellant complains (Appellant's brief page 8) of the trial judge's participation in the examination of witnesses though in *Plotkin* v. *National Comics Publications, Inc.*, 217 F. 2d 332 (2d Cir. 1954)) this Court determined that active interrogatiton of witnesses by judges was a proper exercise of discretion.

Concerning the so-called "Ardizzone incident", appellant complains that it caused "the injection of *insurance* into what was already a highly prejudicial situation." (Appellant's brief page 20). Such a charge is again erroneous. What occurred there was that Judge Cooper observed a spectator in the courtroom making what appeared to be a mocking gesture toward the Court. The Judge inquired of this individual whether he had any connection with the case and ascertained his name/address, the fact that he was known to defense counsel and was with a "carrier" (A286). This incident occupies less than a page and nothing further was said before the jury. All admonishment of this spectator was done outside the presence of the jury (A289-293). As for injecting "insurance" into the case, it was the defense counsel who mentioned insurance to the jury when he read plaintiff's deposition (A423). Thus the spectator's identification of his occupation could not have prejudiced the jury.

Appellant contends (Appellant's brief page 31) that the Court "suggested that the defendant was trying to 'pull the wool' over its eyes and that but for the Court it would be 'like taking candy from a baby' ". Again taking this remark to the jury in context demonstrates clearly that the judge was not referring to either the plaintiff or defendant but was outlining for the jury a definition

of common sense. To charge that this was directed against defendant is to mislead. Thus the instruction taken in its context is innocuous;

> "It then becomes the mission of the fact-finder to piece the known facts together, draw therefrom reasonable, fair, normal inferences, and after careful deduction arrive at a conclusion, if that is at all possible, as to just what brought the accident about and the injuries which ensued therefrom.
>
> . . .
>
> "What I am saying to you, ladies and gentlemen, is that in providing for a jury the law is accommodating the ends of justice. I have seen too many people who have no practical sense, people over whose eyes you can pull the wool over and over again. It is like taking candy from a baby. Practical sense, common sense. Book learning is not enough by a long shot." (A916-917)

The foregoing few examples are illustrative of the litany of baseless charges set out in appellant's brief. Each charge is equally without merit. When analyzed in perspective, each falls.

In the absence of strong proof of prejudice and bias by a judge at trial there is a presumption of disinterested impartiality (*Wolfson* v. *Palmieri,* 396 F. 2d 121 (2d Cir. 1968). As the allegations against the trial judge contained in appellant's brief consist of nothing more than an unfounded harangue, the presumption of impartiality must be maintained.

b) The plaintiff's summation

Appellant's objection to the summation of plaintiff's counsel is twofold. First, objection is to the argument made that plaintiff might not be continuously employed

by defendant after the trial, and secondly, for counsel's mention of the amount of the ad damnum clause.

It is proper argument for a trial counsel in his summation to suggest to a jury future contingencies. Defendant was availing itself of the fact that plaintiff's present loss of earnings had been mitigated by the continued employment of plaintiff after the injury. There was no proof that this employment would continue after trial and into the future and thereby continue to mitigate the loss of future earnings. It is not improper for counsel to suggest to the jury that this employment might not continue. For if the jury was to assume that such mitigation of loss would continue their verdict may not properly reflect plaintiff's potential loss. Summation is argument and it was within the proper limitations of that argument that counsel may call to the attention of the jury such a potential.

In *Philadelphia & Reading Ry.* v. *Skerman,* 247 F. 269, 271 (2d Cir. 1917) this Court held that "counsel has a clear right to state what the plaintiff asks and expects to recover for his injuries." (See, also, *Modave* v. *Long Island Jewish Medical Center, et ano., supra*). Thus, there was no error in plaintiff's counsel advising the jury of the ad damnum clause as the amount "plaintiff asks and expects."

Finally, there is no error in either the plaintiff's counsel saying (A856):

> ". . . from Mr. Anderson's standpoint. This is his day in court. He cannot come back tomorrow, the next day, a year from now and ask for somehting.
>
> . . .
>
> "M.. Anderson receives now or never from your hands what is justly due him as a result of this accident . . .",

or for the Court to say (A905):

> "Now, plaintiff has a duty to mitigate damages by reasonable efforts to secure employment within his competence to perform, and you must ask yourselves, what is the likelihood of that? To what extent can that be anticipated? The law does not permit him to come back again. He can't come back in a few years from now and make a report to you. This is it, to use the vernacular.
>
> "You must make a decision on that point, and make it now. What you say now is what is binding and conclusive, not only for now, but for the future,"

and thus to advise the jury both as argument and in the charge that the plaintiff would be barred from a second or future recovery for the injuries this jury would have already compensated him for.

To read into this some curious "echo" by the Court (Appellant's brief page 23) is to strain reason.

c) Plaintiff's deposition

The remaining claim of error requiring comment is appellant's charge with regard to the testimony about fish hooks. It was defendant's position that plaintiff changed his testimony at trial and for the first time claimed his hand got caught on a fish hook. Defendant desired an inconsistent prior statement of plaintiff's in his deposition wherein he said he didn't know how his hand was caught.

It was for the jury to determine the issue of plaintiff's credibility. As the plaintiff's entire deposition was read to the jury, they were in the position to resolve this disputed issue. Under the circumstances, it was not error for the Trial Court to ascertain for the jury whether plaintiff had the knowledge that he could have changed his deposition at any time prior to signing it (Rule 30(e) FRCP and Rule 32(a)(2) FRCP). No weight can be attached

to plaintiff's failure to change his deposition if he did not know he had the authority to change it.

Should a party change a deposition by appearing before the officer before whom it was originally taken, both the original and the changed answers, and the reasons for the change, are admissible at trial for consideration by the jury (Rule 30(e) FRCP; *Usiak* v. *New York Tank Barge Company,* 229 F. 2d 808 (2d Cir. 1962). Thus, the reading of plaintiff's deposition at the trial and defendant's cross-examination of the plaintiff with the use of his deposition and plaintiff's explanation of his deposition achieved this very result.

In any event all testimony concerning fish hooks was ordered stricken from the record (A744) and the case was presented to the jury on the single theory of inadequate crew. If the testimony concerning fish hooks was so prejudicial to defendant's case, it was incumbent upon defense counsel, at the time the motion to strike every reference to fish hooks was granted to move for a mistrial. His failure to do so (A744-751; 754) was prompted by his desire to have the case go to the jury without any testimony regarding the fish hooks. He can't have it both ways.

Defense counsel miscalculated that without the fish hook testimony there would be a defendant's verdict. His failure to move for a mistrial at that time precludes any claim now that the jury was prejudiced by the stricken testimony.

Finally it should be noted that there was sufficient in the record for this case to also go to the jury on the additional fish hooks theory (A76, 80, 229-234, 390, 392-395, 397, 406-414), and it was error for the Trial Judge to have granted the motion to strike all such testimony. There is clear liability predicated on the single theory of insufficient crew as presented to the jury, but the jury should also have been allowed to determine the negligence of the defendant and

the unseaworthiness of the vessel taking into consideration the testimony relating to fish hooks. This was a fact question for the jury. Should the issue of liability in this case be, for any reason, determined against plaintiff, at the very least, a new trial should be ordered so that plaintiff have the opportunity for a jury determination of that issue.

The charges of bias, prejudice and hostility by the appellant only serve to obscure the uncontradicted aspect of this case that plaintiff suffered a severe and serious injury because of the negligence of the defendant. Under scrutiny each of appellant's contentions of the Trial Court's prejudice are unfounded. On the other hand analysis of the evidence demonstrates the correctness of the jury's judgment.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL T. ANDERSON,
Plaintiff-Appellee,

-against-

GREAT LAKES DREDGE & DOCK CO.,
Defendant-Appellant

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Harold Dudash being duly sworn,

deposes and says that he is over the age of 21 years and resides at 2530 Young Avenue Bronx, N.Y.

That on the 18th day of September 1974 at 1 P.M.
he served the annexed Appellee's Brief upon

Alexander, Ash & Schwartz, 801 Second Avenue, New York, N.Y.
in this action, by delivering to and leaving with said attorneys three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 18th
day of September 1974

Harold Dudash

Robert W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975